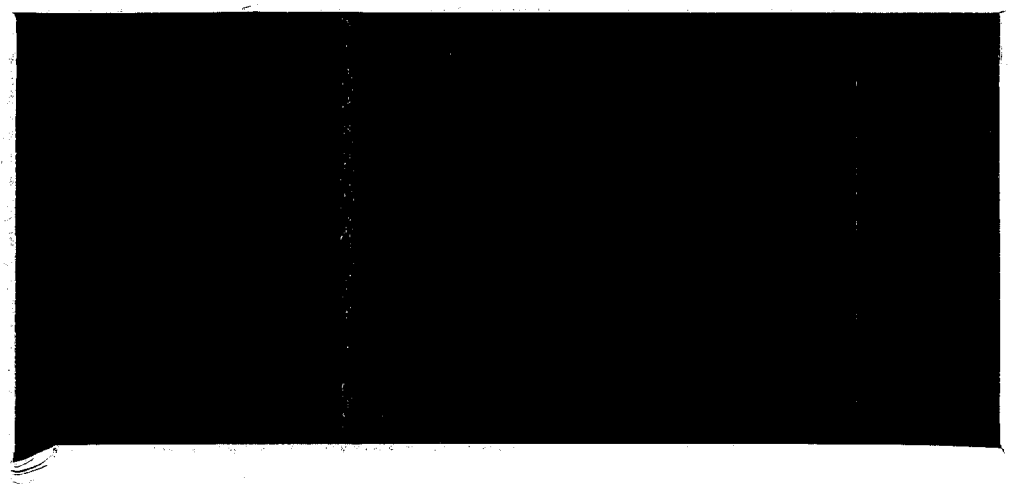

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NATIONAL ENERGY POLICY

AND STATE COASTAL PROGRAMS

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NATIONAL ENERGY POLICY AND STATE COASTAL PROGRAMS: A CRITIQUE OF CURRENT EFFORTS TO BALANCE ENVIRONMENTAL PROTECTION AND ENERGY PRODUCTION ALONG THE COAST

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EXECUTIVE SUMMARY

Regulation of coastal energy facility siting has become an exceedingly complex and costly activity (pp. 5-7). Typically, new programs for regulation or allocation of natural resources are simply overlaid on top of the existing regulatory programs. Consequently, siting regulation today is a process in which, as a condition precedent to construction, a proposed facility must receive approval from each of a large number of federal, state, and local regulatory agencies.

The Coastal Zone Management Act (CZMA) represents an effort to remedy this problem, and is designed to improve state management of coastal resources while reducing the costs of redundant regulation (pp. 5-7). Many supporters of the Act hoped that it would achieve a single comprehensive state management program to guide all decisions involving coastal development. The energy industry feared that such powerful state coastal programs would be a serious impediment to efficient siting of energy facilities and production of energy resources. Neither expectation has been fulfilled. Most state coastal programs have not been vested with sufficiently broad authority to preempt other management programs. Additionally, state

coastal programs have not been the cause of significant delays or costs in the siting of energy facilities. On the other hand, these programs have not made major improvements in the existing regulatory process. In sum, state coastal programs appear not to have had a major impact on the siting regulatory process.

The Coastal Zone Management Act expires in 1980, and Congressional hearings to consider extension of the CZMA are scheduled for the Fall of 1979. Congress must amend the current provisions of the Act that deal with regulation of coastal energy facility siting activities. Simply to re-enact the current siting provisions would be an endorsement of the present ineffective regulatory process.

This paper sets forth eight major modifications that should be made in the CZMA. The first four modifications (pp. 8-11) focus upon clarifying key provisions in the current Act. These four provisions are capable of multiple interpretations, some of which could needlessly increase the complexity and costs associated with the siting regulatory process. Amending the Act to clarify these provisions also reduces the opportunities for lengthy and expensive litigation, another undesirable cost associated with regulation.

The latter four modifications (pp. 12-16) focus upon attributes of the energy facility siting regulatory process that are either ignored or inadequately addressed in the current CZMA. These four proposed modifications are designed to minimize the impediments to an effective and efficient siting process that are caused by the inherent complexities of national energy policy and environmental

protection programs. In order for the CZMA to fulfill its stated mandate of streamlining the current coastal regulatory process, these latter four modifications should be adopted.

Next, this paper sets forth and analyzes two recommended legislative options for amending the CZMA, both of which incorporate the eight suggested modifications. These two options are, for the most part, mutually exclusive. Option A (pp. 17-21) is a more thorough embodiment of the recommended modifications, particularly the latter four modifications. Consequently, Option A is a more complete revision of the current regulatory process. Option B (pp. 21-24) seeks to implement the recommended modifications, but places a greater emphasis on the first four modifications. Thus, Option B is a more marginal shift in the current coastal energy facility siting regulatory process.

Option A is the preferred legislative option, because it possesses a better chance of eliminating the inefficiencies and ineffectiveness of the current regulatory process. Since Option A entails significant changes in the current regulatory process. it can be expected to meet greater political resistance than Option B.

On the other hand, both the President and Congress have taken a number of actions quite recently that reflect a serious commitment to reducing the needless costs and delays associated with the siting of large-scale energy facilities. To the extent that the President and Congress continue to demonstrate dissatisfaction with the current regulatory process, Option A becomes not only the better solution, but a highly feasible one as well.

Finally, this paper includes a separate discussion of statewide energy planning. Such planning is being undertaken by an increasing number of states. Technical assistance and guidance from the Department of Energy could help achieve energy planning programs that do not frustrate, but rather complement the coastal energy facility siting regulatory processes that are set forth in Option A and Option B.

I. INTRODUCTION

This paper summarizes the findings of a 21-month study that has recently been completed by the authors. The study was initiated in the summer of 1977 and had two general objectives: (1) to identify problems that might arise from the implementation of the 1976 energy facility siting amendments to the Federal Coastal Zone Management Act (CZMA); and (2) to recommend legislative and administrative changes in the CZMA to achieve both an efficient energy facility siting process and effective protection for the natural coastal environment. Authorization for expenditures under the CZMA expires in 1980, and Congress will be conducting hearings in the fall of 1979 concerning whether to extend the CZMA and, if so, whether any changes should be made in the Act. The timing of this analysis is thus quite relevant.

Early in the project it became apparent that the private sector believes that the state coastal management programs mandated by the CZMA are an obstruction to efficient siting of energy facilities, despite the existence of a number of provisions of the CZMA designed to prevent just such an occurrence. The energy industry's position is essentially that: (1) the lack of specificity in state coastal programs will create disincentives for the efficient siting of energy facilities along the coast; (2) state coastal program officials are, to a large extent, "captured" by environmental protection interests and will favor such interests over energy production needs regardless of the societal costs associated with such a bias; (3) the consistency clause of the Act provides states with too much power and will allow states to frustrate national energy needs; (4) the CZMA itself is another environmental protection statute that creates one more layer

of red tape and bureaucracy that will increase the cost of energy in this country, and it lacks an effort by the federal government to coordinate the regulatory maze.

The initial effort undertaken in this project was an attempt to create a typology of state siting processes, using the type of state energy regulatory program and the type of energy facility siting mechanism in the state coastal program as the two variables for typing or characterizing the states. It was hoped that the thirty coastal states would fall into a relatively small number of discrete categories that would facilitate further analysis. As a result of an initial survey of state officials from the thirty states that were eligible to participate in the CZMA, two significant observations were made. First, many of the thirty coastal states were not far enough along in the process of creating a coastal management program to have formulated specific organizational arrangements for regulating energy facility siting activities or for coordinating their own energy facility regulation with that of other state agencies. Those few states--Oregon, California, Washington, Maryland, New Jersey, and Rhode Island, most notably--that did have existing mechanisms for regulating coastal energy facility siting had limited, but somewhat successful, experiences with these mechanisms.

The second observation, that state energy resource management programs were in the midst of a transitional stage, was more startling and had greater impact on the subsequent direction of the study. More than half of the fifty states had enacted major legislation concerning energy resource use and management within the previous five or six years. Additionally, there were few patterns or trends to be discerned in this legislation, because most of it varied along at least three different dimensions. These dimensions are: (1) the range of energy resources covered by the program, from one resource (e.g., thermo-electric power plants) to all fossil fuel and renewable energy resources (see, e.g., California's Energy Commission); (2) the types of energy management activities included, from regulation of the price of

intrastate electricity to a range of energy management activities (see, e.g., Maryland's Energy and Coastal Zone Administration Unit); (3) the long-range planning undertaken, ranging from none to long-range supply-demand forecasts (see, e.g., California's Energy Commission).

In most states (coastal and non-coastal alike), energy resource management consists of a patchwork of legislation and executive orders, a product of a number of narrower definitions of energy resource management (e.g., power plant siting, nuclear waste disposal, intrastate gas and electricity pricing, Outer Continental Shelf (OCS) exploration, energy conservation, etc.), each of which is set forth without considering the others, so that the whole energy resource management system lacks a unifying rationale or philosophy.

This second observation raised the concern: How can environmental and land use considerations be integrated into a state's energy resource management program if the various components of the energy management program are uncoordinated, currently undergoing major revision, or lacking in actual experience with siting proposals?

This variability among state energy programs played a role in the subsequent focus of this research. This tremendous variance was a symptom of more serious problems in state energy policy which would complicate any effort to develop a uniform energy facility siting process through amendment of the CZMA.

The coastal energy facility siting experiences of twelve coastal states, representative of all the regions of the nation, were examined in this study (see Appendix D). The coastal programs of these twelve states were examined along the following three dimensions:

1. The procedures adopted by the relevant state agencies for the evaluation of proposed energy facilities.
2. The interaction and communication linkages that exist between the various institutions--both governmental and private sector--that are involved in siting of energy facilities.

3. The specific experiences associated with actual proposals to site energy facilities under the current regulatory mechanism.

Since Washington, Oregon, and California were much further along in developing their coastal programs than almost all of the other states, and since each of these three states had innovative and differing energy programs, these three states were selected for closer study than the other coastal states. This information, to the extent it was available, served as the empirical basis for the analysis undertaken in this project.

II. MAJOR FINDINGS OF THIS ANALYSIS

To date, state coastal programs have not been a significant source of costs in the siting of energy facilities. No state coastal agency has invoked its consistency clause authority to deny the siting of a federal, or federally-licensed, energy development or facility. No state with an approved coastal program has denied a permit to construct a large-scale energy facility. All approved state coastal programs allow the agency to approve energy facilities that are necessary for economic well-being, even if such a facility will adversely affect the natural coastal environment. In short, no state coastal agency has attempted to create a ban, or impose excessive mitigation measures, upon coastal energy facilities (see Appendices B and D).

The energy industry has attributed various costs to state coastal management, charging that the CZMA increases uncertainty concerning their right to build a facility, fosters needless delays and transaction costs by means of a vague and lengthy permit process, and encourages excessive mitigation measures required by coastal agencies. These costs appear instead to be attributable to concurrent regulation by many government agencies, rather than by state coastal programs. Concurrent regulation results from overlapping, or related, subject matter jurisdiction of various federal, state, and local agencies with regulatory authority over some aspect or aspects of the coastal energy facility siting process. Such concurrent regulation has resulted in a synergistic effect in which the time and transactions costs required in regulation have become serious. In addition, differing standards applied by different agencies often unnecessarily complicate the regulatory process (see Appendix B).

The CZMA, by requiring a state to ensure internal consistency in its coastal regulatory activities, and by requiring extensive federal-state agency coordination in drafting the energy elements of a state coastal program, is an effort to reduce some of the inconsistency and overlap in the regulatory process. At the same time, the CZMA reflects the fact that coastal energy facility siting is a highly complex and multi-dimensional policy area in which a variety of governmental and private sector concerns must be balanced (see Appendix B).

Several provisions of the CZMA are ambiguous and can be expected to result in needless costs to the coastal energy facility siting process if they are not amended. The CZMA, as it currently reads, is an overlap of two separate programs: an environmental protection effort in 1972, and an effort to promote efficient development of energy resources in 1976. The Act does little to reconcile these differing programs. Consequently, legitimate disagreements can be expected to develop in many states over what should be the proper role of the state programs. These disagreements can be expected to manifest themselves in litigation over several key provisions of the Act which are capable of several differing interpretations. These provisions are specifically addressed in Part III below (see also Appendix B).

The competing public and private goals that are involved in each coastal energy facility siting regulatory decision must be balanced. This can be most effectively and efficiently accomplished through a multi-agency forum, in which the member agencies, representing a broad range of interests, bargain out a decision (similar to Washington State's process). Other regulatory decision processes that are in use, or have been tried in similar settings, include concurrent regulation by many agencies (the most common approach), "one-stop" regulation by a comprehensive energy agency (the most noted example of this approach is California's Energy Commission), federal

preemption of any state regulation, and special legislation (at either the federal or the state level) for a particular project. Multi-agency bargaining, in a structured process, will most likely provide the greatest net societal gains of the various regulatory decision processes that are available (see Appendices B and C).

The CZMA should be amended explicitly to encourage each state to develop a multi-agency bargaining forum for coastal energy facility siting. Although the current provisions of the Act attempt to reduce the inconsistency and overlap that have plagued the coastal development regulatory process, the Act falls short of achieving any major gains in improving the regulatory process. Specific provisions that should be included in the CZMA to encourage multi-agency bargaining are set forth in Part III below. To the extent that such bargaining is successful in the coastal energy facility siting context, it may be possible to extend the concept to other land use/energy policy areas (see Appendices B and C).

III. NECESSARY MODIFICATIONS IN THE CZMA

Each of the eight modifications set forth below are analyzed in depth in Appendices B and C.

A. Clarification of Ambiguous Provisions in the CZMA

1. The conflicting objectives of coastal zone management -- The language of the CZMA requires state coastal agencies to serve, at the same time, as advocates of coastal preservation and as promoters of efficient energy facility siting, without guidance in how to reconcile these conflicting objectives. The history behind the enactment of the CZMA in 1972 suggests that state coastal agencies were to serve as environmental advocates, a "policer" of coastal development. Contrasted with this are the 1976 Amendments to the Act and their legislative history, which demonstrate a sensitivity to a "rational and managed" exploitation of coastal resources for energy production.

This excessive conflict should be eliminated from the objectives of the Act by specifying the predominant responsibility of state coastal programs and ensuring that the conflicting responsibility be given a subordinate and minor role in the provisions of the CZMA. Resolution of this problem should reduce the difficulties that some coastal agencies are beginning to experience in developing a philosophy or direction to their program. More importantly, reconciliation of these conflicting objectives should reduce the ability of opposing interest groups to intimidate state coastal agencies by bringing, or threatening to bring, lawsuits based on the stated objectives of the CZMA. Clearer language will by no means eliminate organizational

dissention and lawsuits brought against the coastal agency, but the current objectives of the Act are unnecessarily at odds and invite such litigation. Amending the Act to create an advocacy agency for coastal management (rather than a balancer of competing values) is preferred, but only if certain other specific amendments (see discussion in Option A, Part IV, below) are concurrently enacted. This problem can also be resolved by creating a balancer agency, but, again, only in connection with other amendments (see discussion in Option B, Part IV, below).

2. The nature of federal agency involvement in state coastal program development -- The CZMA is not sufficiently explicit in defining the nature of federal agency participation in the formulation of state coastal program content, be it in the context of application for initial program approval or subsequent program amendments. Plausible arguments, based on the language of the Act, can be put forth for two interpretations: (1) a substantive role--that federal agencies are granted a role in formulating the actual content of a state's program--or (2) a procedural role--that federal agencies are only granted a right to "meet and confer" with the states during the program development process to encourage a voluntary accommodation of interests.

Once again, greater clarity in the language of the Act would go a long way toward solving this problem. The Act should explicitly specify whether federal agencies are to have a substantive or a procedural role in the state program approval and amendment process. A procedural role for federal agencies is preferred, but only if certain other specific amendments (see discussion in Option A, Part IV, below) are concurrently enacted. On the other hand, federal agencies should be given a substantive role in developing coastal program content if coupled with a different set of amendments to the Act (see Option B, Part IV, below).

3. Regulatory authority and incentives to undervalue energy resources in a state coastal agency -- The CZMA provides few incentives to state coastal agencies to value coastal energy resources and coastal energy production facilities accurately. There may be considerable disagreement both within and among the states as to whether the coastal agency is an environmental protection advocacy or a rational land use planning agency (see discussion in preceding section), but ensuring adequate energy supplies at reasonable prices is not a primary responsibility of state coastal agencies. In addition, the CZMA does not mandate that state coastal agencies possess any technical expertise in energy forecasting or production and marketing activities. Consequently, these agencies have almost no institutional incentives to make an accurate valuation of coastal energy facilities, and any error will be in undervaluation rather than overvaluation.

At the same time, the CZMA encourages states to vest police power regulatory authority over proposed coastal development (including energy facilities) in their coastal management programs. To vest a de facto veto power in an agency that would, more likely than not, undervalue rather than overvalue a proposed energy facility could likely result in energy supplies insufficient to meet demand and consequent higher energy prices.

State coastal agencies should be prevented from undervaluing energy resources. Alternatively, the ability of these agencies to veto a proposed facility, in disregard of the support for the proposal by other agencies, should be curtailed. It is not necessary, and in fact it may destroy the efficacy of coastal zone management, to eliminate both of these provisions from the Act. It is simply the combination of these incentives and veto power that is troublesome to effective coastal management.

4. The federal-state balance of power in the siting process under Section 307 -- Although the consistency clause is the most visible and controversial provision in Section 307, it is only contained in two of the eight subsections of that section. The other six subsections are addressed to other aspects of federal-state interaction over coastal zone management. A major difficulty with all the provisions of Section 307 is that key terms of this section are left undefined by the Act, do not have a common law history, and are capable of varying constructions. Compounding this problem is the fact that several subsections in 307 appear to conflict with the general thrust of the consistency clause that state coastal programs should be given some special deference by federal agencies.

Greater attention should be given to the provisions in the Act that address this issue of state-federal disputes. Given the nature of coastal energy facility siting policy, such state-federal disputes are inevitable, and the Act should create a mechanism or forum that provides incentives for good-faith negotiating on the part of the involved parties and that achieves equitable outcomes. Whether the states are given a partnership role with the federal government in the siting process (see Option A, Part IV, below) or a less radical, yet nonetheless significant, role in the siting process (see Option B, Part IV, below), the language of the Act must be consistent and clear.

The question is not whether there will be a fuller interpretation given to Section 307, but rather who will make this amplification upon the section. If Congress does not voluntarily pay greater attention to specifying the power and relationships of federal and state agencies to act once a state's program has been approved, then the courts will be forced to make this interpretation. Although the Judiciary is an institution that is quite capable of making an interpretation of the consistency clause, the complexity and highly political nature of federal-state disputes over siting energy facilities makes it more appropriate that Congress act to structure this dispute mechanism.

B. Reshaping the Coastal Siting Process Through the CZMA

1. The dynamic nature of national energy policy -- The CZMA and its regulations provide little useful direction to state coastal officials in defining national energy policy for incorporation into coastal programs because such a task is nearly impossible and only marginally useful. The provisions of the Act which address energy facility siting ignore the exceedingly complex and ever-changing nature of national and state energy policy. The Act requires that the state coastal programs provide "adequate consideration" of the national interest in energy facilities, as though national energy policy were a discrete set of rational principles that could be examined and incorporated, in part, into the state coastal program. The provision of the CZMA that requires coastal programs to include an energy facility planning process comes closer to an implicit recognition of the nebulous, multi-dimensional, and dynamic character of energy policy. Nonetheless, this provision of the Act offers little guidance to states concerning how to incorporate national interest considerations in the regulation of energy facilities.

The real task should be to define national energy policy in the context of specific proposals for energy facilities, recognizing the probable and the possible changes that national energy policy may undergo in the projected useful lifetime of the proposed facility. The Act should ensure that the evaluation of proposed energy facilities by state coastal agencies is based on the most current information available concerning regional and national energy needs. The Act should provide greater specificity concerning which public and private entities should participate in the siting regulatory process, and what role each entity is to play. In other words, the Act should elaborate on the type of process that states must adopt for energy facility siting. At the same time, language such as "adequate consideration" of the national interest in energy, which places an emphasis on the substantive content of a state coastal program, should

be deleted. The result of these changes should be state siting processes with greater sensitivity to the complexity of national energy policy.

2. Coastal energy facility siting as a highly political process -- The CZMA (and, for that matter, most legislation of this type, with the exception of the recent amendments to the Endangered Species Act) ignores the fact that each decision concerning a proposed energy facility requires, to a large extent, value judgments such as how much natural coastline is desirable; how much more energy supply is desirable; whether or not society wants to be dependent upon highly centralized large-scale energy production and marketing networks; whether this generation should foreclose energy options for future generations; and so on. The Act contains no provisions that recognize or address the political nature of these decisions.

The Act should require that, at a minimum, governmental institutions that have responsibility for protecting or implementing certain resource-management goals of the state (e.g., adequate energy supplies at reasonable prices, clean air and water, protection of scarce coastal resources) and the local governments to be directly affected by the proposal share in the decision-making process. At the same time, each state should be given leeway to create a decision process that suits its own energy and natural resource requirements rather than imposing a single decision process upon all states (see discussion of Option A, Part IV, below). Additionally, the Act should strictly limit the role of judicial review of such siting decisions. Judges should not be required to resolve the trade-off between environmental protection and energy production goals, particularly since many lawsuits become bogged down in procedural issues that often have little to do with the substantive decision at hand. Over the long run, society gains very little from lengthy legal proceedings over coastal siting decisions that do not address the substantive concerns of the parties.

3. Inter-agency bargaining in the state regulatory process -- Despite the avowed effort to achieve comprehensive management of coastal development through the CZMA, there exist, at the federal, state, regional, and local levels of government, numerous environmental, land use management, and energy resource programs with strong political support and independent mandates. Many of these programs have different assessment procedures and standards for evaluating and regulating the same activity. It is not uncommon for a proposed coastal energy facility to be required to seek permits from more than a dozen separate governmental entities. Standard Oil of Ohio, in seeking approval of its proposed PACTEX oil pipeline, spent $50 million over five years on plans and environmental studies, obtained 700 permits, and won a Long Beach referendum over its proposed tanker terminal before abandoning this $1 billion project in February 1979 (see Appendix B).

Recent experience with one-stop, comprehensive energy agencies that have authority to preempt other state agencies in the siting process has been problematic. Preempting most of the resource management and environmental regulatory agencies has proven to be extremely difficult to accomplish, from both an institutional and a political perspective. California's Energy Commission, an often-cited example of this comprehensive approach, has yet to approve a proposal for a major power plant, and has been beset by controversy and internal problems since its creation.

The CZMA should encourage states, as a condition of participation in the federal program, to adopt a form of multi-agency bargaining to resolve any disagreements which may exist among the state's major agencies with jurisdiction over coastal energy fac-lity siting. A multi-agency bargaining process should reduce the transaction costs and delays that currently are incurred in the process of bringing major state agencies together to attempt to hammer out differences in their policies and standards. In addition, a multi-agency bargaining process should reduce the ability of a single state agency to exercise a de facto veto over the proposal when all other state agencies want

to approve the proposal. At the same time, a multi-agency bargaining process retains the internal checks and balances in the coastal siting regulatory process that are cut back upon by the use of a comprehensive siting agency with preemptive authority. These checks are provided by the fact that each agency retains its independence and acts, to some extent, as a "policer" of the actions of the other agencies. These checks and balances help ensure full and adequate assessments of the potential environmental and economic costs associated with a proposal. They also help to keep the decision-making processes in the public arena.

4. Mutual accommodation of federal and state interests in siting decisions -- The consistency clause, though designed to achieve equitable resolutions of federal-state disputes over siting proposals, creates incentives for federal and state officials to act as adversaries in developing coastal programs and in evaluating proposal for siting energy facilities. Although the CZMA requires that state coastal program officials involve federal agencies in the development of state programs, the existence of the consistency clause encourages state officials to avoid federal involvement in its program. To the extent that a state successfully resists having its program content changed by federal agencies, it can later use its consistency clause authority to ensure that state goals for the future of the coast are successfully carried out. Consequently, state officials are faced with these conflicting incentives regarding federal input.

In addition, the consistency clause places considerable emphasis on the precise content of state coastal programs, which are to serve as the yardstick for all parties--private, state, and federal--to determine whether the proposal should be approved. These programs, given the nature of the energy policy and the state of the art in coastal zone management, must be general rather than specific. Requiring that the decisions concerning proposed energy facilities should hinge on the precise terms used in the programs unncessarily complicates the siting regulatory process.

The Act should adopt a mechanism for the resolution of federal-state disputes that provides the various parties with incentives to reach a mutual accommodation, rather than incentives to outlast each other in a game of "hide and go seek." The preferable amendment to the Act, set forth in Option A, would delete the consistency clause and replace it with bargaining among various involved parties in a relatively structured format. Since the terms of the state coastal program would not constrain the decision of a Bargaining Panel, but rather the participating entities would assume responsibility for the outcomes, many of the incentives to focus on the precise language used in the programs would be eliminated. Deletion of the consistency clause is also necessary under Option A because of other aspects of that model (see discussion in Part IV, below).

The alternative proposed amendment to the Act is set forth in Option B, and consists of changing only those aspects of the consistency clause that are particularly susceptibel to manipulation. One significant change suggested in Option B is vesting the authority to invoke the consistency clause only in the Governor's Office. This is based on the assumption that the Governor is not as closely involved in coastal-zone management as the program officials and, consequently, will be less inclined to use (or threaten to use) the consistency clause authority inappropriately.

IV. RECOMMENDED AMENDMENTS TO THE CZMA

Options A and B are alternative proposals for amending the CZMA, both focusing primarily on the energy facility siting provisions of the Act. Option A embodies a thorough adoption of the conclusions set forth in Part III of this paper and is a more radical review of the CZMA than Option B. The two options are for the most part mutually exclusive. They are both analyzed in greater detail in Appendices C and D.

Option A. Major Revisions in the CZMA

Option A encourages the state coastal program to serve as environmental advocate and to represent the interests of environmental groups concerning coastal management. Option A also removes the authority of state coastal programs to exercise either an explicit or a de facto veto over proposed coastal facilities. This coastal agency, as advocate for ocean policy and environmental concerns, will take part in the decision-making and help to shape the outcome of every siting decision, but will have to negotiate with other key resource management agencies over whether a facility will be approved and, if so, what conditions or standards will be imposed upon the developer. There are four major components to Option A, which follow.

1. State coastal management agencies are to serve as environmental protection advocates and represent the interests of environmental and marine protection groups. The language of the CZMA that requires state coastal agencies to balance environmental, economic, and energy (among other competing) goals should be deleted and the language requiring these agencies to protect and preserve the valuable natural resources of the coast should be highlighted.

2. State coastal programs should be essentially a product of state concerns and objectives. Federal agency involvement should be limited to a procedural role that encourages them only to meet and confer with state coastal agency officials throughout the program development process. The Act should make explicit the fact that a state is under no legal obligation to adopt the recommendations of federal agencies. The Act should retain a provision requiring that the federal and state agencies meet and confer, because both sides have suggested that there is much to be gained from the sharing of information, particularly early in the program development process. State government, organized interest groups within the state, local government, and state residents should all continue to have a role in program development so that the program reflects the state's perspective and desires concerning coastal zone management.

3. State coastal agencies are not to be given the authority or power to exercise independent veto power over proposed coastal energy facilities. The CZMA should provide that if the state coastal agency objects to a proposed facility, it must convene a State Energy Facility Appeals Board (SEFAB) to decide whether or not the coastal agency's objections should be upheld. Ideally, this concept should be extended to cover all of a state's resource-management agencies. No single agency should hold a veto power over a facility, and any agency that wishes to deny a proposal to build such a large-scale energy facility should seek to convene a SEFAB to evaluate the proposed facility. This would result in minimal interference by the CZMA in the energy facility impact assessment and licensing arrangements that each state currently uses, because the SEFAB is composed entirely of officials of state and intrastate government entities, is formed on an ad-hoc basis to consider a specific proposal, and has no separate existence of its own (either budget or staff).

The CZMA should allow the states to structure the SEFAB, subject to the constraint that at least the following government entities each have representation on the Board: (1) state coastal

agency; (2) primary state energy agency; (3) state legislature; (4) the local government entity with jurisdiction over the coastal site being proposed by the developer; and (5) the local government entity (be it inland or coastal) that contains the next most suitable site, assuming that such an alternative site exists within the state. Consequently, the SEFAB will consist of, at a minimum, four (if no alternative site exists within the state) or five members. Washington State's Energy Facility Site Evaluation Council (EFSEC) is similar in concept to this SEFAB, although they have selected fifteen members as the appropriate size for their siting council in an effort to achieve representation of many state natural resource management programs in this decision process. The Act should not specify the exact membership and configuration of a SEFAB, but rather leave this to the discretion of each coastal state. Since the SEFAB does not supplant the siting regulatory process existing in the state, but only hears appeals when the state coastal agency proposes to reject a facility that other state agencies want to approve, the time frame for SEFAB decision should be limited to two months. All of the impact assessment, analysis, and agency decisions will have taken place prior to SEFAB consideration of a case, so there is no need for a lengthy SEFAB decision process.

Legislative representation on a SEFAB is essential. Too often these decisions are made by commissions or agency chiefs that are appointed to office by a Governor, and many serve at the Governor's pleasure. To help achieve the diversity of perspective that is desirable, and in recognition of the political judgments embodied in these decisions, there should be representation on the SEFAB that is accountable to the public independent of a Governor. State and local legislative representatives would achieve such a goal. Finally, the decisions arrived at by a SEFAB should be subject to only limited judicial review. These natural resource allocation decisions can best be made by the executive and legislative branches of government, and the courts should not review the substantive provisions of decisions reached by a SEFAB.

4. The consistency clause of the CZMA is to be deleted, and federal-state disputes over proposed energy facilities should be resolved through the use of Coastal Site Bargaining Panels. A Bargaining Panel would become necessary only when three conditions all exist: (1) there is a perceived net national benefit to be gained from the proposed facility; (2) the SEFAB has either rejected the proposal or modified it to the point that the developer believes it is not feasible; and (3) either the Federal Department of Energy or the Office of the President believes that the developer's complaint merits evaluation by a Bargaining Panel.

The Bargaining Panel would consist of one representative from each of the five entities: (1) state coastal agency; (2) Governor; (3) developer (be it a private or a governmental entity); (4) the Federal Department of Energy (DOE); and (5) the President. The inclusion of two representatives of chief executives provides that single-issue or advocacy interests do not dominate the Bargaining Panel. This will help to achieve agreement on a body that includes a representative of the developer and a representative of the coastal agency. Inclusion of two state representatives attempts to prevent the national perspective from dominating the state.

The Bargaining Panel would require four affirmative votes to arrive at any decision concerning the proposal, and must do so in the limit time period of five months. Failure to reach a solution within this time frame would result in the decision's being made solely by the representatives of the Governor and of the President within one month of the decision's being "kicked upstairs" to them. This Panel would operate more like collective bargaining in labor-management relations than like traditional regulatory agencies. Each member could negotiate and compromise to achieve an acceptable solution to at least four members. Requiring four votes for a decision to be reached is the key to ensuring good-faith bargaining on the part of each of the Panel members. Any attempt to sabotage the Panel by a single member must fail, because a decision can be reached without

him. Each member represents an organization that has interests and objectives that are somewhat at odds with the other four members, and this discourages excessively strong coalitions from forming too early in the bargaining. The two representatives of the Chief Executives will, by virtue of their constituencies, take a moderate stand in the bargaining. The requirement of four votes for a decision protects the state from being "railroaded" by the federal government. Since the state possesses two of the five votes, at least one of the two state representatives must agree to any decision reached. Even if the five members fail to reach an outcome and the decision is "kicked upstairs," the state must agree to any proposed outcome. The Act should provide the Panel with the authority to waive the requirements of any existing resource management program, if this is necessary to achieve agreement. Decisions of these Panels would be subject to judicial review only for the purposes of ensuring that the Panels are properly formed and comply with procedural requirements. The substance of the decisions reached by these Panels should be exempt from judicial review.

Option B. Minor Revisions in the CZMA

Option B requires that the state coastal management agency be an objective balancing agency, weighing environmental, energy, and economic goals in its decisions. This is in contrast to the advocacy, single-interest structure of coastal programs under Option A. Option B allows the state to decide whether the state coastal agency is to exercise regulatory authority (through either concurrent or comprehensive decision-making) over energy facility siting, but the discretion that the state coastal agency has to exercise such authority is specified. In addition, the mechanism for resolution of federal-state disputes is clarified so that all interested parties understand the limits to their authority and the role of the other parties in this decision process. Option B is an effort to clean up the language of the CZMA. A serious problem here is that of overlegalization of the

entire policy area. In attempting to eliminate a loophole in a statute by making the statute more specific, the result can sometimes be the creation of other loopholes created by negative inference.

The four major components of Option B are set forth as follows.

1. A state coastal management agency must act as an objective, rational planning body that is supposed to seek resource allocation solutions that reflect the aggregated preferences of all parties (local, state, and national) that will be affected by the coastal agency's decision. Language in the CZMA that can be construed as allowing coastal agencies to act as environmental advocates should be deleted and replaced with language that specifies the responsibility of state coastal agencies efficiently and rationally to balance energy, environment, and economy in the coast. State coastal programs would be charged to find the "highest and best societal use" in making decisions concerning proposed energy developments.

2. The energy element of a state coastal program would contain two types of policies concerning the facility-siting process: (1) advisory policies and (2) enforceable policies. Advisory policies would be those standards that each state adopts based on an intrastate analysis of state needs, goals, etc. There would be no federal control over the substance of these advisory policies. These policies would have no binding effect upon a developer, but would be useful to include in a state's coastal program to provide all parties with notice as to the "philosophy" of the program and the direction in which the coastal agency would like to move. Enforceable policies would be those standards that were the product of a federal-state analysis and that subsequently received a federal imprimatur. These policies would be enforceable upon all proposed facilities and a developer would have to comply with all applicable enforceable policies to gain state coastal agency approval.

The provisions of the CZMA requiring that states provide "adequate consideration" of the national interest in energy facilities--a nebulous requirement that has been the source of much disagreement--

would be deleted. In its place, the Act should include a requirement that no policy of a state coastal program can become enforceable until the relevant federal agencies have approved it. To help ensure that these federal agencies give the appropriate attention and effort to this review and sign-off responsibility, this procedure should include a formal acknowledgment signed by an Assistant-Secretary-level official of each federal agency that must approve the state policies. The acknowledgment should recite the fact that approval of the policy by the undersigned official allows the policy to become enforceable upon all development proposals that the agency supports or will support, and that the policy can thereafter serve as a basis for the state's invocation of its consistency clause authority. This formality serves to put each federal agency on notice as to the seriousness of this activity, preventing an agency from later claiming that no approval had actually been given; that the agency officials did not have the requisite authority to approve the policy; or that the agency did not realize the implications of a sign-off. Approval by federal agencies of state policies would not bind federal agencies forever; existing procedures for amending state coastal programs would allow a state to revise its policies whenever appropriate.

3. The CZMA should explicitly require, at the consistency clause appellate proceedings stage, that both the state and the developer submit to the Secretary of Commerce counter-proposals that suggest how to accommodate both the national interest and the state interest involved in the proposed energy facility. This requirement would not prevent the Secretary of Commerce from seeking advice or similar counter-proposals from federal agencies such as DOE. The counter-proposals to be submitted by the state and the developer should also address the objections of each to the other's counter-proposal, so that the Secretary will be fully briefed on the conflict. In most cases, these two counter-proposals would probably set the limits on the decision that the Secretary would reach, unless either or both counter-proposals are clearly unrealistic. The Secretary

should be free to adopt either counter-proposal in its entirety, adopt portions of either or both counter-proposals, or reject both of them and come up with some different solution.

4. Key terms in the consistency clause should be clarified to reduce misunderstandings and litigation over the use of this clause. (a) The authority to invoke the consistency clause should be vested only in the Governor's office, rather than allowing it to be delegated to the agency that is designated as the lead agency for coastal zone management. This would help ensure that the consistency clause would not be unnecessarily or hastily invoked in those states where the head of the coastal agency is independent of the Governor. In addition, it would make consistency a more visible and more political process, both of which are desirable. (b) Consistency determinations for direct federal activities should be made by OCZM instead of by the same federal agency that is proposing the activity. The current provisions create an apparent conflict of interest by allowing the same federal agency "objectively" to evaluate its own proposal. OCZM would apply the less stringent standard of "consistent to the maximum extent practicable" in making its review of proposed federal activities to assure protection for federal coastal activities. (c) The Act must clarify the key term "consistent" as used in the consistency clause. "Consistent" is not a term of art that has played a significant role in other similar legislation, so that failure to define this term more explicitly, coupled with the failure of OCZM to define "consistency" in the regulations, will allow the courts to decide just what the standard of "consistency" requires. "Consistency in principle" is an appropriate definition for the consistency clause, given that coastal energy facility siting is a policy area that is fraught with imponderables and subjectivity. Application of this less rigid standard should result in more informal resolutions than if a more stringent standard of exact and complete compliance were adopted. (d) The apparent contradiction between the non-derogation clause (Section 307(e)) and the consistency clause should be eliminated by

either deleting 307(e) or specifying that it does not apply in those situations where the state properly invokes the consistency clause. Given the fact that the consistency clause is crucial to successful cooperation between the federal and state governments in management of the coast, this clause should not be negated by the broad sweeping language of 307(e).

Without an amendment specifying what this provision is supposed to mean and how it is to be reconciled with the consistency clause, once again the courts will decide how to construe these ambiguous provisions of Section 307. As is true with most of these issues in coastal energy facility siting, the courts are quite capable of construing the ambiguous terms of the Act. The real question is whether it is appropriate for the courts to make these value judgments concerning the division of power between the federal and state governments and the allocation of delicate and irreplaceable natural resources.

V. STATEWIDE ENERGY PLANNING

This analysis of statewide energy planning was undertaken separate and apart from the above analysis of coastal energy facility siting regulation. This topic is discussed at this point because a state's management of energy production, marketing, and consumption will undoubtedly have a clear and significant impact on its energy facility siting activities.

This chapter seeks to set for a model planning process that will complement the siting process discussed above. Statewide energy planning is analyzed in depth in Appendix A.

Finding: Optimally, coastal energy facility siting should be part of a statewide energy planning process.

Moderate- and large-scale energy facilities are components of statewide and multistate energy networks. Factors that must be considered in siting facilities--such as service area, alternative supplies, demand forecasts, and alternative locations--have statewide and multistate dimensions. In contrast, the coastal zone usually incorporates a small geographic portion of a state; the inland limit rarely extends beyond the inland boundary of ocean-fronting counties. The relatively narrow management zone creates two closely related problems: (1) the limited ability of the coastal management agency to look at factors that transcend the coastal zone; (2) the possible displacement of energy facilities to less suitable inland sites.

In most states, the coastal management agency cannot be expected to make an adequate assessment of the many facility location factors that extend beyond the inland limit of the coastal zone.

The coastal management agency, by means of permit denial or permit conditions, standard setting, or invoking the consistency clause (or some combination of the three), may displace energy facilities inland beyond the coastal zone. Few coastal agencies have the authority to prevent siting a large-scale energy facility by denying a permit; however, many of the coastal agencies must meet needed environmental standards which may result in siting energy facilities in inland locations. A state might also be able to achieve the same result through invoking the consistency clause.

It is conceivable that an energy facility will not only cost more to locate inland than on the coast, but also generate a greater net adverse environmental impact. For example, ground and surface water supplies are limited in California, and utilities will very likely have to force sizable acreages of irrigated agriculture out of production in order to use the water for cooling purposes.

Option C. Recommended Federal Legislation for the Development of State Energy Plans

Option C involves a shift in perspective from the issue of coastal energy facility site regulation by the states, nominally a land-use management activity, to the issue of state energy planning, an activity generally addressed to getting maximum power out of our available energy resources. (See Appendix A.) State energy planning affects, and itself is affected by, the energy facility siting process, but the two are sufficiently discrete policy areas that they should be undertaken separately rather than within a single super-agency.

Option C derives primarily from two findings: energy facility siting requires at least a statewide perspective; and energy facility siting should be conducted in connection with a comprehensive state energy planning program. The development and implementation of state energy plans complements and reinforces Option A, which removes the language in CZMA requiring state coastal agencies to balance environmental and energy goals. The management of energy resources and the

management of coastal resources can be better served by two agencies carrying out their respective ma ates. Separation of the two programs should provide checks and balances. Coordination arrangements between the two programs and a State Energy Facilities Appeals Board should prevent the checks and balances from creating unwarranted economic and social costs. The requirement that state energy plans be comprehensive does not necessitate the creation of a super-agency with either preemptive authority or the ability to override all other agencies that could possibly affect energy policy. To give a state energy agency such vast authority could cause serious problems for the state's siting process.

There are five major components to Option C, which follow.

1. DOE would establish an office to administer the grants and to oversee the development and implementation of state programs. An Office of State Energy Plans would have several functions in addition to grants administration, such as compiling and updating an index of all federal legislation that affects energy facility siting. Another office responsibility would be establishing an applied research agenda and research priorities for assisting states in the energy planning process. For example, improvements are needed in forecasting and needs assessment models. The Office of State Energy Plans would also be expected to set up a communications network to expedite the flow of information on federal activities that might influence state plans, such as the projections in the importation of various fuels and unit prices.

2. Each state would establish an organization arrangement for developing and implementing the energy plan. In those cases where a complex interagency and intergovernmental process is established, the state must submit a description of roles, responsibilities, and authorities which will contribute to a unified energy plan. Again, the Act would not require the creation of a central management agency at the state level, although the energy planning agency would need to have adequate legislative or executive authority to implement its

plan and the policies and requirements of the DOE legislation and regulations. The Act would require the establishment of a statewide, rather than solely a coastal, State Energy Facility Appeals Board (SEFAB). As described in Option A, SEFAB is an ad-hoc panel designed to resolve disputes between energy facility siting and other state and federal programs such as coastal zone management, air basin plans, and water quality plans.

3. The grants-in-aid program would be the driving force of the Act. The federal ratio would be expected to be at least 2 to 1, with a higher ratio (perhaps 4 to 1) for consortia of states, to encourage planning on an interstate basis. The federal share may diminish after states develop acceptable programs and have had the opportunity to recognize the benefits of the planning process.

Initially, the grants-in-aid program's annual budget could approach two hundred million dollars. A national tax on energy consumption would be a possible means of funding the program. This arrangement would be similar to the electricity tax levied by several states to support power plan planning activities. It could be argued that a 200-million-dollar appropriation would have an anti-inflationary effect in the long run, because the plans would achieve significantly greater efficiencies in the production and conservation of energy.

4. The Act and the regulations would establish standards that must be developed and adopted in order for a state energy plan to be approved by the Secretary of Energy. State energy plans would have to meet specific standards set forth by DOE. The Secretary would not approve plans that did not meet the stndards, and without an approved plan the state would not be eligible for implementation grants. These standards are necessary because statewide energy planning is an activity that requires the active participation of at least four or five resource management agencies in any particular state. The opportunities for jurisdictional overlap and conflict are considerably greater than is true for a coastal energy facility siting regulatory process alone. Consequently, these standards

attempt to spell out explicitly the activities that must be a part of a statewide energy planning process.

A state energy plan would be expected to include the following procedural and authority components:

a. State capability to make independent forecasts of energy supply and demand.
b. Certificate of need requirement before the site proposal evaluation.
c. Identification of potentially unsuitable locations for energy facilities.
d. A master application process for evaluating the site proposal.
e. An arrangement for consolidating review and evaluation of a proposal.
f. An early identification of potential conflicts.
g. In coastal states, inclusion of an inland site in the alternative locations proposed.
h. Impact assessment conducted by a multi-agency team.
i. Opportunities for public participation in all stages of the proposal process.
j. Means to resolve interagency conflicts.
k. Limited judicial review of administrative decisions.
l. Pre- and post-construction monitoring by the state of approved proposals.

5. The Secretary of Energy would have the authority to decertify plans after determination has been made that a state is not adequately implementing its plan. Decertification would terminate federal implementation grants. (See Appendix A for a fuller discussion of statewide energy planning.)

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INSTITUTE OF URBAN AND REGIONAL DEVELOPMENT

BERKELEY, CALIFORNIA 94720

August 10, 1979

Dr. Edward Lewis
Coastal Zone Management Advisory Committee
Page Building No. 1
3300 Whitehaven
Washington, D.C. 20234

Dear Dr. Lewis:

Enclosed is a copy of National Energy Policy and State Coastal Programs and its accompanying appendices. This report is the result of a study that was funded by the U.S. Department of Energy and conducted by myself and Jens Sorensen over a twenty-one-month period, ending in April 1979. I am sending you this report because it contains a critique of the current Coastal Zone Management Act (CZMA) provisions on energy facility siting.

In short, our report concludes that there is no evidence that the CZMA or state coastal programs are frustrating the efficient siting of large-scale energy facilities. Nonetheless, if the Act is to fulfill its legislative mandate of achieving some affirmative improvement in the overall federal and state regulatory processes governing coastal energy facility siting, certain provisions of the CZMA should be modified.

The provisions of the Act that we believe require modification are essentially the same provisions that the Office of Coastal Zone Management (OCZM) has identified as requiring modification. To the extent that our specific proposals for modification differ from those of OCZM, we hope that our proposals provide a different perspective on the issues. A comparison of our recommended legislative proposals with those of OCZM will undoubtedly serve a useful function. Such a comparison will highlight the underlying assumptions and the expected consequences that are part of each set of proposals. This exercise can only serve to strengthen any amendments to the CZMA that Congress may adopt in 1980.

I hope the report is of some value to you. Please feel free to contact me with any questions that you may have concerning this report.

Sincerely,

Randele Kanouse

Randele Kanouse
Energy Policy Analyst

RK:djh
Encl.